TINTA PRESS SDN. BHD.

v.

BANK ISLAM (M) BHD.

SUPREME COURT, KUALA LUMPUR
SALLEH ABAS LP
SYED AGIL SCJ
WAN HAMZAH SCJ
[CIVIL APPEAL NO. 293 OF 1985]
23 DECEMBER 1986

CIVIL PROCEDURE: *Lease - Arrears of rentals - Repossession - Partially successful - Writ - Ex parte application for mandatory injunction - Granted - Application to dissolve injunction - Dismissed - Appeal - When interlocutory injunction may be made ex parte - Lease agreement - Whether in fact a loan agreement.*

The respondent agreed at the request of the appellant to purchase certain equipment for the purpose of leasing the same to the appellant. The appellant fell into arrears of rentals and the respondent repossessed the leased equipment after giving the necessary notice of demand. The respondent was only partially successful because they were physically prevented by the appellant from doing so.

The respondent then filed a writ as well as an *ex parte* application for a mandatory injunction.

The learned Judge granted the mandatory injunction and the appellant's application to dissolve it was dismissed. The appellant appealed to the Supreme Court.

Held:

[1] The Court's discretionary power to grant a mandatory injunction is provided for in s. 53 of the Specific Relief Act 1950 and this includes the power to grant mandatory injunctions before trial. (*Wah Loong (Jelapang) Tin Mine Sdn. Bhd. v. Chia Ngen Yick and Sivaperuman v. Heah Seok Yeong Realty Sdn. Bhd.*

[2] The application for interlocutory injunction may be made *ex parte* in exceptional and urgent cases (O. 29 r. 1(2) of the Rules of the High Court 1980).

[3] The interlocutory injunction is only granted in rare and clear cases where the Court feels a similar injunction would probably be granted at the trial on the ground that the plaintiff's interest will be protected, otherwise irreparable injury and inconvenience would result.

[4] On the facts the learned Judge exercised his discretion properly to grant the mandatory injunction.

[5] The appellant's argument that the lease agreement was in fact a loan agreement was rejected because the equipment remained at all times the property of the respondent and that a relationship of lessor and lessee existed between the respondent and the appellant.

[Appeal dismissed with costs.]

Cases referred to:

Wah Loong (Jelapang) Tin Mine Sdn.Bhd. v. Chia Ngen Yick [1975] 2 MLJ 109
Sivaperuman v. Heah Seok Yeong Realty Sdn. Bhd. [1979] 1 MLJ 150
Gibb & Co. v. Malaysia Building Society Bhd. [1982] CLJ (Rep) 99
Shepherd Homes Ltd. v. Sandham [1971] 1 Ch 340
Credit Corporation (Malaysia) Bhd. v. K.M. Basheer Ahmad & Anor. [1985] CLJ (Rep) 94

Legislation referred to:
Rules of the High Court 1980, O. 29, r. 1(2)
Specific Relief Act 1950 Act, s. 53

For the appellant - Dennis Xavier (Vincent Chandran with him); M/s. Dennis Xavier & Co.
For the respondent - Y.M. Raja Aziz Addruse (Mohd. Noor Hj. Don with him); M/s. Radzi Sheikh Ahmad Noor & Farid

JUDGMENT

Syed Agil SCJ:

Earlier we dismissed this appeal with costs and made an order that the deposit of RM500 be paid to the respondent on account of costs. We considered the appeal on two main grounds, *viz.* (1) the legal issue and (2) the factual issue.

As regards (1), the question was whether the Court has a discretionary power to issue a mandatory injunction on an *ex parte* application under O. 29 r. 1(2) of RHC 1980. We applied the principles cited in several relevant authorities and decided on the facts and circumstances of this case, the Court has such jurisdiction. With regard to (2), on the facts available before the learned Judge, we were satisfied that he had not wrongly exercised his discretion as to merit our interference.

Before elaborating our grounds, we would like to deal with the facts so far disclosed in the affidavits and documents exhibited thereto.

On 9 December 1983 Bank Islam Malaysia Bhd., a limited company incorporated under the Companies Act 1965 (the respondent), by a letter of offer to the appellant, a private company limited by shares under the Companies Act, approved the appellant's application and agreed to provide facilities by issuing letters of credit for the purchase of printing equipment amounting the RM3,832,000, which would be leased to the appellant, subject to certain conditions as stated in the said letter (WAR 1 p. 92 Vol. 2).

In accordance with the letter of offer, the lease was for a period of seven years commencing from 30 December 1983 and the rentals were payable in advance in the sum of RM72,762.40 per month by eighty-four monthly instalments. The appellant had also to pay two rental deposits valued at three months' rental of the machinery for each deposit according to the dates specified at para. 11 of the letter of offer. The first deposit was to cover the rental for the first three months. The rentals for the fourth month onwards had to be paid in advance at the beginning of each month. The appellant paid the sum of RM105,000 by cheque towards the rental deposit on 9 December 1983, and on 6 January 1984 paid a further sum of RM113,287.20 towards the same making a total of RM218,287.20. However, the appellant had failed to pay further monthly rentals of RM72,762.40 per month as agreed, but made only two part-payments of RM10,000 each on 13 April 1984 and 24 July 1984 respectively. The appellant by letter dated 23 March 1984 requested the respondent to allow them to defer four months towards the payment of the rentals. The respondent however informed the appellant that they could defer the payment of the deposit instead but not the rentals. On 5 May 1984 the appellant was in arrears of rents to the tune of RM175,899.75 as stated in their letter of reminder. On 28 June 1984 the respondent wrote again reminding the appellant that he was in arrears of RM245,806.75 in rentals.

On 2 August 1984 they executed a lease of printing equipment agreement (the lease agreement) incorporating some of the terms of the earlier agreement whereby the respondent at the request of the appellant agreed to purchase the said equipment for the purpose of leasing the same to the appellant. The lease was to commence on 30 December 1983 as agreed upon and expressly provided by item (4) to the schedule of the lease agreement. The respondent became the lessor and the appellant the lessee. The facility granted was based on Islamic banking business which

included the appellant's profit margin and was subject to the terms and conditions stated in the lease agreement. By this lease agreement, some of the terms contained in the letter of offer of 9 December 1983 were varied. The rental was now fixed at RM69,907 per month payable in advance in respect of the lease term of eightyfour months commencing from 30 December 1983. There is no provision for rental deposits in the lease agreement. Instead it provides for security deposit of RM209,721 which was to be paid by the appellant on execution of the lease agreement. It was provided that the security deposit shall be retained by the lessor (i.e., the respondent) as security of the due observation and performance by the lessee (i.e., the appellant) of the stipulations, terms and conditions of the lease agreement, and the security deposit shall not be treated as payment of rent or any part thereof. Three named persons signed the lease agreement as guarantors for the appellant. It is clear that by 10 August 1984 the appellant was in arrears of rentals due and had not paid the security deposit as agreed in the lease agreement. On that date, the respondent's solicitors wrote a notice demanding payment within seven days. On the appellant's failure to comply with their request, the respondent after making known to the appellant of their intention by letter, took possession of the equipment under the provision of the lease agreement. They succeeded in dismantling and removing one unit and while in the process of removing the second unit, the appellant and his servants or agents closed and locked the premises, thus preventing the respondent from taking possession of the rest of the equipment. Subsequently the respondent filed a writ against the appellant and the three guarantors and on the same day, i.e., 13 September 1984, filed the *ex parte* application for mandatory injunction which was granted by the Court on 25 September 1984. Subsequently on 10 October 1984, the appellant filed an *ex parte* application to dissolve and set aside the injunction. It was dismissed by Zakaria J.

The discretionary power of the Court to grant a mandatory injunction is provided by s. 53 of the Specific Relief Act 1950 (Act 137). By judicial process, and power is extended to the granting of an interlocutory mandatory injunction before trial. Such discretion however must be exercised and an injunction granted only in exceptional and extremely rare cases as was held in *Wah Loong (Jelapang) Tin Mine Sdn. Bhd. v. Chia Ngen Yick* [1975] 2 MLJ 109 and confirmed by the Federal Court in *Sivaperuman v. Heah Seok Yeong Realty Sdn. Bhd.* [1979] 1 MLJ 150. The case must be unusually strong and clear in that the Court must feel assured that a similar injunction would probably be granted at the trial on the ground that it would be just and equitable that the plaintiff's interest be protected by immediate issue of an injunction, otherwise irreparable injury and inconvenience would result. (see *Gibb & Co. v. Malaysia Building Society Bhd.* [1982] CLJ (Rep) 99, and *Shepherd Homes Ltd. v. Sandham* [1971] 1 Ch 340). Where the case is one of urgency, O. 29 r. 1(2) RHC 1980 allows an application to be made *ex parte*. We are satisfied that the learned Judge on the facts and surrounding circumstances of this case rightly concluded that this was an exceptional case where the Court was justified in granting a mandatory injunction on an *ex parte* application before the trial.

With regard to (2), the main issue raised in the appellant's affidavit was that the lease agreement was in fact a loan agreement. It was denied by the respondent in their affidavit. The learned Judge concluded from the documents attached and the affidavit evidence that it was not so. With respect, we agree on the following grounds:

(1) The printing equipment is owned by the respondent. This fact is expressly provided in very clear terms in the lease agreement. In the third recital, the respondent as the lessor has agreed to purchase the equipment as described in the Schedule for the purpose of leasing the same to the appellant as the lessee. Under clause 16, it is agreed that the equipment shall remain the property of the respondent. Clause 16 states:

Nothing herein contained shall confer on lessee any right of property or interest in or to the equipment which shall remain the property of lessor and lessee shall have no right or interest therein otherwise than as bailee.

Under clause 15(i), the lessee is duty bound to return the equipment in good order to the lessor on the expiry of the lease.

(2) The relationship between the parties are that of lessor and lessee; the respondent being the legal owner of the equipment, thereby retaining the ownership of it while the appellant at whose request the equipment was purchased, has the possession and use of the equipment, subject to the payments of rentals and other requirements as stipulated in the agreement and agreed upon between the parties. (See *Credit Corporation (Malaysia) Bhd. v. K.M. Basheer Ahmad & Anor.* [1985] CLJ (Rep) 94).

We are also satisfied of the following:

(1) There was a clear breach of the lease agreement by the appellant. As stated earlier, the appellant defaulted in paying the monthly rentals and the respondent's solicitors sent a notice of demand but to no avail. By virtue of clause 14 of the lease agreement, therefore, the respondent became entitled to immediate possession of thee equipment. That was acted upon by the respondent and as stated earlier, they succeeded only in removing one unit and were prevented from taking possessing of the rest by the appellant and their servant or agents.

(2) That at the trial of the suit, the learned Judge was confident that the Court would grant a mandatory injunction against the appellant. On the other hand, if the injunction had not been granted earlier, the respondent would probably suffer irreparable damage and greater hardship.

(3) The balance of convenience was very much in favour of the respondent since the value of the equipment would be reduced considerably and there was a likelihood that the respondent would not be able to recover even half of the money spent in purchasing the equipment.

(4) The application was one of urgency and any delay would cause irreparable damage to the respondent as stated in para. (2) above.

(5) The learned Judge came to the conclusion that the respondent had been "helpful and extremely polite" to the appellant. They had attempted to recover the money due to them step by step by acting diligently and prudently. It was only after they had failed to get rentals due from the appellant that they decided to take possession of the equipment according to the terms of the lease agreement. When that failed, they sought legal remedy by filing a writ applying for an injunction. We agree with respect with the learned Judge that there was no unreasonable delay on the part of the respondent in filing the writ and the *ex parte* application for injunction.

From the above, we are satisfied that this is a case where Zakaria J was more than justified in granting a mandatory injunction before the trial on an *ex parte* application.

Also found at [1987] 1 CLJ 447